

76-466

NO. A-203

Supreme Court, U. S.

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**BEFORE THE UNITED STATES
SUPREME COURT**

MARGARET L. EDWARDS, Widow of
RALPH EDWARDS, JR., and
JESSICA LYNN EDWARDS, a minor,
by and through her next friend
and mother, MARGARET L. EDWARDS,

Appellants,

vs.

ANDREW PRICE and STRAIGHT CREEK
CONSTRUCTORS, GIBBONS AND REED
CONSTRUCTION CO., WESTERN PAVING
COMPANY and AL JOHNSON
CONSTRUCTION CO.,

Appellees.

**ON DIRECT APPEAL FROM THE COLORADO
SUPREME COURT**

JURISDICTIONAL STATEMENT

Theodore M. Smith
Salina Star Route
Gold Hill
Boulder, Colorado 80302

Attorney for Appellants

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OPINION OF THE COLORADO SUPREME COURT

The decision of the Colorado Supreme Court is not yet officially reported but is reported unofficially at 550 P.2d 856. A copy of its decision is appended at p. A1.

JURISDICTION OF THE UNITED STATES SUPREME COURT

This was an action brought in Colorado state courts for the wrongful death of Appellant Price's husband, which action the Colorado courts held was barred by *Colo. Rev. Stat. Ann.* § 8-48-101 (1973)¹, the constitutionality of which statute is the only question here.

The decision of the Colorado Supreme Court of which review is sought was entered on June 1, 1976; that court denied a petition for rehearing on June 28, 1976;² and on September 8, 1976, this Court, by Mr. Justice White, ordered that this docketing statement be filed on or before October 1, 1976.

The notice of appeal was filed in the Colorado Supreme Court on August 26, 1976.³

Appellants respectfully submit that this Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1257(2) because the court of last resort of a state has upheld the constitutionality of a state statute. The cases upon which Appellants' claim of unconstitutionality of the state statute are based are set forth *infra*, pp. 3-4.

QUESTION ON APPEAL

The sole question on appeal to this Supreme Court is whether *Colo. Rev. Stat. Ann.* § 8-48-101 (1973) is constitutionally valid or whether it sets forth an invalid classification of those persons who may pursue civil actions against tortfeasors under workmen's compensation statutes.

1. A copy of the statute is appended at p. D-1, and it may be found at Vol. 3, p. 492 of the Colorado Revised Statutes of 1973.
2. A copy of the order denying rehearing is appended at p. B-1.
3. A copy of the notice of appeal is appended at p. C-1.

STATEMENT OF THE CASE

Appellants' decedant was killed on a construction accident when a truck backed up and ran over him.⁴

Decedant Edward's employer, one Jelco, Inc., was a sub-contractor of four other companies which purported to be members of a joint venture.

Negligence of another joint venturer seems obvious, but is not here in question, for the trial court and the Colorado Supreme Court did not believe they had to reach that issue.

Rather, the state trial court and the Colorado Supreme Court relied upon the statute here questioned, *Colo. Rev. Stat. Ann.* § 8-48-101 (1973), and held that under that law a "constructive," or "statutory," employee of a sub-contractor of the purported joint venture was entitled to only those limited benefits of the state's workmen's compensation law, some twenty-odd thousand dollars, and that his survivors could not sue his constructive employer in a civil action.

Accordingly, the state trial court held, and the state supreme court affirmed, that the bar to private actions against "constructive" employers barred any action by his heirs against those who putatively caused his death.

Appellants did collect some workmen's compensation benefits, but they were not permitted to prosecute their ordinary rights under state common law because of the statute.

These are the facts giving rise to this appeal.

PRESENTATION OF CONSTITUTIONAL QUESTIONS

The specific constitutional question here presented was raised by Appellants at every possible time: in Appellants' Memorandum in Opposition to Defendants (*sic*) Motion for Summary Judgment (as transmitted by the Colorado Supreme Court, folios 146-150); in the judgment of the trial court, folios 169-171; in the brief of then

4. The facts of the case are set forth both in the decision of the Colorado Supreme Court, p. A-1, and the record on appeal, requested to be transmitted under the rules.

counsel for Appellants at its pages 11-22; in the decision of the Colorado Supreme Court appended hereto; and in Appellants' motion for rehearing, all as presented in the record now being forwarded to this Court.

SUBSTANTIAL NATURE OF FEDERAL QUESTION

The general question here is of substantial importance to the law because this Court has not had occasion to state the law as to the constitutionality of workmen's compensation laws differing between classifications of workers since 1917.⁵ More important, many or most states have statutes like Colorado's limiting common law recovery if some party has paid some sort of compensation benefits, and these industrial accidents are hardly unimportant. In one year some 14,500 were killed in industrial accidents and more than 2.2 million were disabled,⁶ so that this case takes on far more importance even than the results upon the facts of this case.

Additionally, there is a dispute among the several states as to just what is a reasonable classification of those denied private rights,⁷ and even in the instant case the chief justice of the Colorado Supreme Court, dissenting, found no rational basis for the purportedly constitutional classification in this case. See dissenting opinion of Pringle, C.J., p. A-8-9.

Tersely, there is a substantial federal question because, as last stated by this Supreme Court,

"It is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is

5. See *New York Central R.R. v. White*, 243 U.S. 188 (1917), discussed *infra*.

6. 1970 U.S. Code Congressional & Administrative News, p. 5178.

7. E.g., *Stevenson v. Industrial Comm'n*, 545 P. 2d 712 (Colo. 1976); *Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding*, 310 So. 2d 4 (Fla. 1975); *Gutierrez v. Glasser Crandel Co.*, 388 Mich. 654, 202 N.W. 2d 786 (1972); *Stanton V. Lloyd Hammond Produce Farms*, 67 Mich. App. 279, 240 N.W. 2d 773 (1976); *Kinney v. Kaiser Aluminum & Chemical Corp.*, 41 Ohio St. 2d 120, 322 N.E. 2d 880 (1975).

answerable are found to be at fault, to require him to contribute a reasonable amount . . . by way of compensation for the loss of earning power incurred in the common enterprise . . . " *New York Central R.R. v. White*, 243 U.S. 188, 203-204 (1917).

So the law, since last stated by this Court, is essentially that an employer—or another party—may be immune from common law action, but only if that other party in turn renders some measure of liability to the employee.

Still, a state legislature may adjust certain benefits between an employer and some certain classes of employees if "the classification itself is rationally related to a legitimate government interest." *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

None of these tests are met in this case nor by the Colorado statute.⁸

The statute, *Colo. Rev. Stat. Ann.* § 8-48-101 (1973), appended at p. D-1, establishes irrational classifications in each of these ways:

A. The statute permits common law actions against other subcontractors irrespective of whether they have procured workmen's compensation insurance.

B. The statute permits actions against other contractors or employers regardless of whether either must provide the complimentary workmen's compensation benefits.

C. *Most specifically*, in this case, the statute as interpreted by the state courts allows an employer to avoid liability at common law by calling himself a joint venturer, and not a contractor, without thereby incurring any common law or compensation liability because another joint venturer may have liability insurance supplying the required benefit for his own employee.

Generally, then, the state statute allows an abrogation of a common law remedy without a corresponding benefit in workmen's compensation proceeds, and the variation

8. Neither the statute in question, no any part of the act, contains any severability clause which might justify the upholding of this section.

among those entitled to bring suit at common law and those not so entitled bears no reasonable relation to the legitimate purposes of the legislature of the State of Colorado.

Because of the number of individuals involved in Colorado and elsewhere, and because of the substantiality of the federal question involved, Appellants respectfully request that this Court determine that a substantial federal question is here invoked.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Supreme Court note probable jurisdiction in this case and require consideration on the merits of the case.

Theodore M. Smith
Salina Star Route
Gold Hill
Boulder, Colorado 80302

Attorney for Appellants

APPENDIX

DECISION OF THE COLORADO SUPREME COURT 500 P.2d 856

Margaret L. EDWARDS, widow of Ralph Edwards, Jr.,
and Jessica Lynn Edwards, a minor, by and through her
next friend and mother, Margaret L. Edwards, Plain-
tiffs-Appellants,

v.

Andrew PRICE et al., Defendants-Appellees.
No. 26890.

Supreme Court of Colorado,
En Banc.

June 1, 1976.

Rehearing Denied June 28, 1976.

George A. Hinshaw, Aurora, J. Christian Wieland,
Denver, Colo., for plaintiffs-appellants.

Sheldon, Bayer, McLean & Glasman, Richard C.
McLean, Denver, for defendants-appellees.

KELLEY, Justice.

This appeal by plaintiffs arises out of an entry of summary judgment in a negligence action in favor of the defendants on the basis that the action was barred because of the statute which provides that an injured employee of a subcontractor may not bring action against the general contractor. Section 8-48-101, C.R.S. 1973.¹ Plaintiffs contend that the summary judgment was improperly granted, that they were entitled to judgment as a matter of law, and that section 8-48-101, C.R.S. 1973, is unconstitutional as a denial of equal protection. We do not agree, and affirm the judgment of the trial court.

On November 27, 1971, Ralph J. Edwards was killed when a truck driven by defendant Andrew Price ran over

1. Formerly C.R.S. 1963, 81-9-1; as amended, section 8-48-101, C.R.S. 1973 (1975 Supp.).

him. At the time of the accident, both men were employed in the construction of the Straight Creek Tunnel.

Defendant Price was employed by defendant Straight Creek Constructors (SCC).² Defendant SCC consisted "of four individual contractors who have joined together under the name of Straight Creek Constructors to construct the Straight Creek Tunnel."³ The four contractors referred to are named defendants.

The decedent was employed by Jelco, Inc., which was a subcontractor of SCC for electrical work on the tunnel. The decedent's survivors filed a workmen's compensation claim, which was paid either by Jelco, Inc., or its insurance carrier.

Subsequently, the survivors, as plaintiffs, commenced the negligence action which is the subject of this appeal. The defendants' answer denied negligence, asserting that the decedent was contributorily negligent, and that in any event the negligence action was barred by section 8-48-101, C.R.S. 1973.

The defendants then filed a motion for summary judgment. They also answered plaintiffs' interrogatories and requests for admission, and responded to motions for the production of documents.

Based upon this record, the trial court granted the motion for summary judgment in favor of the defendants as a matter of law, holding that under the facts of the case the action was barred by section 8-48-101, C.R.S. 1973. Plaintiffs then perfected this appeal.

I. SUMMARY JUDGMENT

C.R.C.P. 56(c) provides that a summary judgment shall be rendered

2. Although plaintiffs attempted to establish that Price was not employed by SCC, their complaint and other documents in the record reveal the existence of such an employment relationship.
3. This statement is quoted from plaintiffs' complaint.

"... if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.)

Plaintiffs contend that a summary judgment was improper because there were two material facts in dispute and, alternatively, that even if the facts were uncontroverted, they were entitled to judgment as a matter of law.

No Genuine Issue as to Material Facts

Plaintiffs contend that the existence of the following two factual matters precluded the summary judgment: (1) the decedent's employment status, and (2) the business relationship of defendants. The gist of plaintiffs' argument is that because these two issues involved factual matters, a summary judgment was improper.

[1] Plaintiffs' argument misapprehends the nature of summary judgment. A summary judgment is proper, even when factual matters are involved, if the record indicates that the factual matters are not in dispute.

The record in the present case shows that the defendants met their burden of clearly demonstrating the absence of a genuine issue of fact as to the two factual matters noted by plaintiffs. *Primock v. Hamilton*, 168 Colo. 524, 452 P.2d 375 (1969); *O'Herron v. State Farm Mutual Auto. Ins. Co.*, 156 Colo. 164, 397 P.2d 227 (1964).

Regarding the decedent's employment status, plaintiffs' complaint expressly states that at the time of the accident, the decedent was employed as an electrical maintenance worker by Jelco, Inc., a subcontractor who contracted electrical maintenance work on the Straight Creek Tunnel. This statement of fact is not controverted anywhere in the record.

Regarding the business relationship of the defendants, plaintiffs' complaint states that "Straight Creek Con-

structors consists of four individual contractors who have joined together under the name of Straight Creek Constructors to construct the Straight Creek Tunnel." Other documents in the record support this factual assertion,⁴ which was likewise not controverted in the record.

Judgment as a Matter of Law

Based upon the uncontroverted facts, the defendants were entitled to a judgment as a matter of law. The applicable law is stated in section 8-48-101, C.R.S.1973,⁵ which provides: "(1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 54 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles, and such lessee, sublessee, contractor, or subcontractor, as well as any employee thereof, shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor, and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said lessee, sublessee, contractor, or subcontractor.

"(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work insures and keeps insured his liability for compensation as provided in arti-

4. This factual description of the business relationship of the defendants is distinguished from the legal characterization of the relationship, which is discussed in the next section of this opinion.

5. As amended, 8-48-101, C.R.S. 1973 (1975 Supp.).

cles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind, including actions under section 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof."

[2] The record discloses SCC affirmatively asserted that it was a joint venture composed of the other four defendant construction companies.⁶ The undisputed facts in the record support this conclusion of law because the following three criteria of a joint venture are satisfied: (1) joint interest in property among the alleged joint venturers, (2) express or implied agreement to share in profits or losses of the venture, and (3) actions and conduct showing cooperation in the project. *Breckenridge Co. v Swales Management Corp.*, 185 Colo. 160, 522 P.2d 737 (1974).

The record reveals the following undisputed facts:

—The truck involved in the accident was owned by and titled in the name of SCC:

—Defendant Price was an employee of SCC, and was paid by check issued by SCC:

—SCC was established as a joint venture by a written agreement between the four defendant contractors;

—Jelco, Inc.'s subcontract agreement was made by the four defendant contractors "d/b/a Straight Creek Constructors;"

—The contract with the highway department for the construction of the tunnel was made in the name of the four defendant contractors as a joint venture;

6. Gibbons and Reed Construction Co., Kemper Construction Co., Western Paving Co., and Al Johnson Constuction Co.

—SCC was paid directly by the highway department under the construction contract; and

—Plaintiffs' complaint characterizes SCC as "four individual contractors who have joined together under the name of Straight Creek Tunnel."

These facts compel the legal conclusion that SCC was a joint venture.

[3] We hold that a joint venture falls within the meaning of the term "company" in section 8-48-101, C.R.S. 1973. See *Breckenridge Co. v. Swales Management Corp.*, *supra*; *Snyder v. Indus. Comm'n*, 138 Colo. 523, 335 P.2d 543 (1959). Therefore, as a "company" engaged in the business of constructing a tunnel by contracting out part of the work to Jelco, Inc., SCC was a statutory employer of the decedent under section 8-48-101, C.R.S. 1973.

As a statutory employer, SCC was liable for workmen's compensation benefits to the decedent's survivors if Jelco, Inc., had failed to obtain workmen's compensation insurance coverage.⁷ However, the survivors received their workmen's compensation benefits from Jelco, Inc., and as noted above, the statute provides that under those circumstances the survivors cannot maintain a negligence action against SCC or any of its principals. The trial court properly entered judgment in favor of the defendants.⁸

II. EQUAL PROTECTION

While we consider and dispose of an equal protection

7. The four principals were jointly and severally liable for any workmen's compensation benefits assessed against SCC. *Snyder v. Indus. Comm'n*, *supra*.
8. Plaintiffs do not address separately the issue of defendant Price's liability as distinguished from the liability of Price's employer, SCC. See *Hamm v. Thompson*, 143 Colo. 298, 353 P.2d 73 (1960). We therefore assume, without deciding, that plaintiffs concede the judgment as to defend Price was proper.

challenge to section 8-48-101, C.R.S.1973, in *O'Quinn v. Walt Disney Productions, Inc.*, 177 Colo. 190, 493 P.2d 344 (1972), the basis of plaintiffs' present equal protection challenge differs sufficiently from the challenge raised in *O'Quinn* to warrant some discussion.

In *O'Quinn* we held that the creation of the classification of statutory employers and employees under section 8-48-101, C.R.S.1973, was not a denial of equal protection. In this case, plaintiffs' argument is narrower.

Plaintiffs note that the statute does not bar negligence actions by employees of one subcontractor against another subcontractor. *Krueger v. Merriman Electric*, 29 Colo. App. 492, 488 P.2d 228 (1971), nor negligence actions by employees of the general contractor against a subcontractor. *Frohlick Crane Service v. Mack*, 182 Colo. 34, 510 P.2d 891 (1973). However, plaintiffs point out that under the present statute⁹ employees of a subcontractor are barred from bringing an action against the general contractor, and they contend that this classification denies them equal protection of the laws.

[4] The challenged classification is not based upon "a suspect classification," nor does it infringe upon "a fundamental right." Therefore, under general constitutional principles, the statutory classification is valid if it satisfies the "rational basis" test. *Stevenson v. Indus. Comm'n*, Colo. 545 P.2d 712 (1976). This test requires only that the classification bear a reasonable relationship to a legitimate state objective.

The public policy upon which the Workmen's Compensation Act is founded derives from the need to provide monetary relief for workmen injured in the course of their employment, regardless of the negligence of the employer or the lack of negligence on the part of the employee. *O'Quinn v. Walt Disney Productions, Inc.*, *supra*. The

9. Prior to 1963, the statute provided that the general contractor could be sued for negligence by an injured employee of a subcontractor if the subcontractor was properly insured. See e.g., *Thomas v. Farnsworth Chambers Co.*, 286 F.2d 270 (10th Cir. 1960). In 1963, the statute was amended to preclude such a suit whether or not the subcontractor was properly insured.

underlying concept is one of "no fault." It is further the policy in Colorado and the great majority of states to make the more financially solvent general contractor ultimately responsible for workman's compensation benefits arising out of injuries to employees of all subcontractors. 2A *Larson, Workmen's Compensation Law* § 72.31 (1973 ed.). These policy interests are embodied in section 8-48-101 C.R.S.1973, and are a legitimate state objective.

In return for this ultimate statutory liability, the general contractor is relieved of any liability for "contribution or action of any kind, including actions under section 8-52-108." Section 8-48-101(2), C.R.S.1973. The subcontractors are not subjected to this ultimate liability for injuries to employees of the general contractor or other subcontractors. Thus, the subcontractors are not immunized from common-law actions by employees of the general contractor or other subcontractors.

It is the general contractor to whom the employees of all subcontractors may look for workmen's compensation if their immediate employer is uninsured or financially irresponsible. This distinguishes the general contractor from the subcontractor and is the rationale which sustains the different treatment accorded general contractors by the statute.

[5] We hold that the immunity granted to a general contractor as a statutory employer under section 8-48-101, C.R.S.1973, from negligence actions by an injured employee of a subcontractor does not effect a denial of equal protection to a legitimate state objective.

The judgment of the trial court is affirmed.

PRINGLE, C.J., dissents.

PRINGLE, Chief Justice (dissenting):

I respectfully dissent.

I can see no rational basis for permitting employees of the principal contractor to sue at common law for injuries

received from the negligence of a subcontractor, and not permit employees of the subcontractor to sue at common law for injuries received from the negligence of the principal contractor.

I would hold the statute unconstitutional by reason of an arbitrary classification which denies equal protection.

COLORADO SUPREME COURT

On petition for rehearing

June 28, 1976.

DENIED.

Filed August 26, 1976
IN THE COLORADO SUPREME COURT

No. 26890

MARGARET L. EDWARDS, Widow of)
RALPH EDWARDS, JR., and)
JESSICA LYNN EDWARDS, a minor,)
by and through her next friend)
and mother, MARGARET L. EDWARDS,)

Plaintiffs-Appellants,)

v.)

ANDREW PRICE and STRAIGHT CREEK)
CONSTRUCTORS, GIBBONS AND REED)
CONSTRUCTION CO., KEMPER)
CONSTRUCTION CO., WESTERN)
PAVING COMPANY and AL JOHNSON)
CONSTRUCTION CO.,)

Defendants-Appellees.)

NOTICE OF
APPEAL

PLEASE TAKE NOTICE that all Plaintiffs-Appellants
hereby appeal to the United States Supreme Court from
the judgment of this Court of June 1, 1976 and the order
denying petition for rehearing of June 28, 1976.

S/Theodore M. Smith
Theodore M. Smith, No 4055
Salina Star Route
Gold Hill
Boulder, Colorado 80302
Telephone: 303/444-1072

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1976, I
deposited a true and accurate copy of the foregoing Notice
of Appeal in the United States mails, first class postage
prepaid, addressed to:

Richard C. McLean
SHELDON, BAYER, McLEAN & GLASSMAN
American National Bank Building
Denver, Colorado 80202

S/Theodore M. Smith

THE COLORADO STATUTE

The Colorado statute in question, *Colo. Rev. Stat. Ann.* § 8-48-101 (1973), is:

"(1) Any person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be an employer as defined in articles 40 to 54 of this title and shall be liable as provided in said articles to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractors, and subcontractors and their employees. The employer, before commencing said work, shall insure and keep insured his liability as provided in said articles, and such lessee, sublessee, contractor, or subcontractor, as well as any employee thereof, shall be deemed employees as defined in said articles. The employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor, or subcontractor, and may withhold and deduct the same from the contract price or any royalties or other money due, owing, or to become due said lessee, sublessee, contractor, or subcontractor.

"(2) If said lessee, sublessee, contractor, or subcontractor is himself an employer in the doing of such work and, before commencing such work insures and keeps insured his liability for compensation as provided in articles 40 to 54 of this title, neither said lessee, sublessee, contractor, or subcontractor, its employees, or its insurer shall have any right of contribution or action of any kind including actions under section 8-52-108, against the person, company, or corporation operating or engaged in or conducting any business by leasing or contracting out any part or all of the work thereof."